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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

ZELL MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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RULE 29.6 LIST

In their Petition for a Writ of Certiorari (filed Jan. 26, 1996), the Petitioners listed their parent corporations and nonwholly owned subsidiaries. Pursuant to Rule 29.6, that list is hereby incorporated into this document.

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Although the Candidates' Brief ("Opp.") is termed an "Opposition" to the petitions of the Broadcasters and the United States, that title obscures the considerable agreement among the parties concerning the propriety of review in this Court of the Eleventh Circuit's decision in *Miller* v. *FCC*, 66 F.3d 1140 (11th Cir. 1995). First, there is no dispute between the parties that the ruling below that no case or controversy existed was incorrect. As the Candidates concede, "[t]he putative preemptive effect of the Declaratory Ruling created a sufficient case or controversy." Conditional Cross-Pet. at 7. Thus, the parties agree that the question of the authority of the FCC to issue a pre-emptive order is the real question posed by the holding below. This holding is worthy of review because, contrary to the Administrative Procedure Act and decisions of this Court, it effectively prevents federal

agencies from using declaratory orders to pre-empt state law. Pet. at 16-20; Pet. of United States at 18-22.

Second, although the Candidates' "Opposition" and Conditional Cross-Petition indicate that they disagree with the Broadcasters and the United States on the merits, there is little in either filing disputing that the scope of the FCC's authority to pre-empt state law is an important question or that the Eleventh Circuit's decision will have serious adverse practical effects for the FCC particularly, and all federal agencies generally. Indeed, the Candidates' filings indicate that they are nearly as anxious to have these issues resolved as are the Broadcasters and the United States—albeit disagreeing over the proper resolution. Conditional Cross-Pet. at i, 6-11.

Despite the general agreement on these issues, the Candidates nevertheless hedge their position and oppose the petitions, primarily by attempting to rebut the showing of the Broadcasters and the United States that the ruling below fundamentally misconstrues this Court's decisions regarding an agency's pre-emption power.[1] Even though the Eleventh Circuit's decision provided no support for its assertion that the FCC could not pre-empt state law, the Candidates claim that the decision "reflects fundamental principles of constitutional law." Opp. at 5. The Candidates then provide an inventory of constitutional law principles in search of a rationale behind the

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[1] It should not be surprising that the Candidates would attempt to provide the justification—missing in the opinion below—to support the court's holding that "it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction." Pet. App. 9a. This is because the court's dismissal of the Candidates' petition for review was tantamount to a holding on the merits that the FCC had no authority to pre-empt state causes of action. Accordingly, denial of the petitions for certiorari would be almost as beneficial to the Candidates as a win on the merits. *See* Pet. at 11.

decision below, *id.* at 5-9, but the Candidates ultimately fail to demonstrate how their list of principles casts doubt upon, or even applies to, the FCC's Declaratory Ruling. While a complete exposition of the merits should properly await the Court's plenary review, several of the Candidates' arguments warrant a response because they involve fundamental misreadings of the decisions of this Court.

1. First, the Candidates explain that the Eleventh Circuit's holding (and the total lack of support for it) was justified under a " 'deeply rooted presumption in favor of concurrent state court jurisdiction.' " Opp. at 5 (quoting *Tafflin* v. *Levitt*, 493 U.S. 455, 459 (1990)). Even a casual reading of *Tafflin* and other relevant precedent makes clear that the presumption applies only when determining whether Congress or the agency *intended* to preempt state law. *Tafflin*, 493 U.S. at 458-59; *Hillsborough County* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985). Once that intent is clearly expressed, as it was in the FCC's Declaratory Ruling, the presumption is overcome, and thus it has no relevance to analyzing the scope of an agency's pre-emption power. *Tafflin*, 493 U.S. at 45 (stating that the presumption "is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction"); *Hillsborough County*, 471 U.S. at 715-16 (noting that, "[o]f course, the same principles [of the pre-emption presumption] apply where, as here, the field is said to have been pre-empted by an agency"). Accordingly, if, as the Candidates assume, the Eleventh Circuit's holding "reflects" this principle of constitutional law, then the ruling conflicts with decisions of this Court for yet another reason and thus certiorari is doubly warranted.

2. The Candidates next assert that Congress did not delegate to the FCC in the Communications Act sufficiently broad power to encompass the pre-emption of state law in the Declaratory Ruling. Opp. at 5-6. The Candidates' citation to the entire Communications Act for the proposition that the "FCC has no authority or duty to

investigate, determine policy, or formulate rules, with respect to preemption of state causes of action," *id.*, fails to account for the specific authority Congress delegated to the FCC in Sections 4(i) and 303(r) of the Communications Act. This Court has described that delegation of power as giving " 'broad authority' " and " 'a comprehensive mandate' with 'not niggardly but expansive powers.' " *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68, 173 (1968) (citation omitted). Under both those sections, and similar general grants of authority in other organic statutes, this Court has repeatedly permitted agencies to pre-empt state law. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 160-61 (1982) (upholding agency pre-emption where Congress delegated to agency the "authoriz[ation], under such rules and regulations as it may prescribe, to provide for [*inter alia*] the . . . operation and regulation of" savings and loans) (citation omitted); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) (permitting agency pre-emption under "broad responsibilities" granted to FCC by Congress in Section 2(a) of the Communications Act).

Incredibly, and ignoring the case law cited in the petitions, Pet. at 15 (citing to *Kay* v. *FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970); *Chisholm* v. *FCC*, 538 F.2d 349, 357 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976)), the Candidates assert that Congress's even more specific delegation of authority in Section 315(d) is meant merely to "permit[] the FCC to elaborate on the meaning of the various terms used in Section 315." Opp. at 6. That section authorizes the FCC to "precribe appropriate rules and regulations to carry out" Section 315, 47 U.S.C. § 315(d), and courts of appeals examining this section have confirmed that "enforcement of the statute . . . [is] vested in the Federal Communications Commission," thus undercutting the Candidates' crabbed reading of § 315(d). See, *e.g.*, *Belluso* v. *Turner Com-*

munications Corp., 633 F.2d 393, 396-97 (5th Cir. 1980).[2]

The Candidates similarly suggest that the FCC has exceeded its delegated authority from Congress by pre-empting entire state causes of action rather than inconsistent state regulations. See, *e.g.*, Opp. at 10 (stating there is no precedent for "the FCC or any other federal agency" to "preempt a state law cause of action"); Conditional Cross-Pet. at 14 (distinguishing relevant cases on that ground). Again, however, if the Candidates are correct in asserting that this is the principle of law "reflect[ed]" in the ruling below, then the decision certainly warrants further review. Under this Court's decisions in *de la Cuesta* and *City of New York* v. *FCC*, 486 U.S. 57 (1988), assuming there has been a sufficiently broad delegation of authority, an agency's power to pre-empt is as broad as that possessed by Congress. And, it is indisputable that Congress is able to pre-empt an entire state law cause of action. See, *e.g.*, *Farmers Educ. & Coop. Union of Am.* v. *WDAY, Inc.*, 360 U.S. 525, 535 (1959) ("abrogat[ing]" all state law "causes of action for libel"); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 140-41 (1990).[3]

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[2] The Candidates suggest, Opp. at 6, that, in the Communications Act's "savings clause," 47 U.S.C. § 414, Congress limited the ability of the FCC to pre-empt state law claims under Section 315(b). As the FCC recognized, *see* Pet. App. 50a-51a, that clause, which provides that the Act does not "in any way abridge or alter the remedies *now existing* at common law or by statute," 47 U.S.C. § 414 (emphasis added), plainly does not limit the FCC from pre-empting state law claims under Section 315(b), because those claims were not "now existing," for such claims by definition only exist because of the duties imposed by the Communications Act. *See Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *Comtronics, Inc.* v. *Puerto Rico Tel. Co.*, 553 F.2d 701, 707-08 n.6 (1st Cir. 1977).

[3] The Candidates cite *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638 (1990), to support the argument that an agency may not "regulate the scope of judicial power vested by the statute." Opp. at 8-9. Apart from the fact that the language relied upon by the Candi-

3. The Eleventh Circuit stated—again without explanation—that Congress "could not delegate" to the FCC the power to pre-empt state law and thereby oust courts of jurisdiction. According to the Candidates, this holding "reflects" two fundamental principles of constitutional law contained in Article III: first, that the legislative or executive branches are not permitted to "prescribe a rule of decision in federal diversity cases," Opp. at 8 (relying on *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)), and second, that Congress (and thus an agency) cannot " 'provide for executive branch review of a judicial determination.' " *Id.* at 11 (quoting *Town of Deerfield* v. *FCC*, 992 F.2d 420, 428-29 (2d Cir. 1993)). The holding below, however, could not "reflect" these principles, no matter how fundamental they are, because the FCC's Declaratory Ruling plainly did not violate either principle.

The Candidates conclude that the FCC's Declaratory Ruling "purports to prescribe a rule of decision" because it states that any cause of action under § 315(b) initiated in federal court " 'is preempted *and should be dismissed.*' " Opp. at 8 (quoting United States Pet. App. 40a n.8) (emphasis added by Candidates). As the language from *Plaut* that the Candidates omit from their citation indicates, however, Congress (or an agency acting under delegated authority) does not prescribe a rule of decision

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dates was dicta, the statute involved in that case, the Agricultural Worker Protection Act, delegated to the Department of Labor only the power to set substantive standards of conduct. *Adams Fruit*, 494 U.S. at 649-50. Congress in the Act expressly created a federal private right of action and thus did not delegate any enforcement authority to the Department of Labor. *Id.* Accordingly, the Department's views regarding the pre-emptive scope of the federal right of action were entitled to no weight. In the Communications Act, on the other hand, Congress has "charged [the FCC] with the statute's enforcement," *Hernstadt* v. *FCC*, 677 F.2d 893, 903 (D.C. Cir. 1980), both in the general grant of authority and in Section 315(d). *See supra* at 4-5. Accordingly, *Adams Fruit* provides no support for the Eleventh Circuit's holding.

merely by " 'amend[ing] applicable law.' " *Plaut*, 115 S. Ct. at 1452 (citation omitted). That is what the FCC has done in its Declaratory Ruling: amended its regulations under the Communications Act to pre-empt state causes of action and to establish a uniform, federal law.

Similarly, nothing in *Town of Deerfield* remotely supports the Candidates' arguments. In that case, the FCC improperly issued an order in an adjudicatory proceeding which already had been decided by four other courts and which therefore should have been dismissed under basic concepts of collateral estoppel. *Town of Deerfield*, 992 F.2d at 427-29. In contrast, nothing in the Declaratory Ruling purported to reverse final judicial determinations of law; the FCC merely invoked its delegated authority from Congress and issued a rule of law for courts to apply.

4. Finally, the Candidates, in passing, argue that the FCC's determination that Congress itself intended to pre-empt state law causes of action under Section 315 is improper. The Broadcasters did not petition the Court for review of this issue, because it was the FCC's alternative holding, making it unnecessary for the Court to consider it in order to uphold the validity of the Declaratory Ruling. Now that the Candidates have cross-petitioned for review on this issue, however, the Broadcasters submit that the FCC's interpretation of Congress's intent in enacting Section 315 was entirely correct and that that interpretation is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-45 (1984).[4] Thus, as the Broadcasters

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[4] The Candidates' argument that *Houston Post Co.* v. *United States*, 79 F. Supp. 199 (S.D. Tex. 1948) supports the ruling below is plainly without merit. Opp. at 13-14. That case is squarely inconsistent with *Chevron* and other decisions of this Court deferring to an agency's interpretation of the statute it administers. *See also Farmers Educ. & Coop. Union of Am.* v. *WDAY, Inc.*, 360 U.S. 525, 533 (1959) (holding that Congress pre-empted state libel causes of action through Section 315(a) and relying in part

state in their Response to the Conditional Cross-Petition, they do not oppose review of the question whether the FCC correctly found that Congress intended to pre-empt state law in enacting Section 315(b), along with the questions presented in the petitions of the Broadcasters and the United States. For reasons stated in the Response, however, the Broadcasters are doubtful this Court would have reason to address that issue.

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At the end of the day, the Candidates offer neither a serious defense of the Eleventh Circuit's holding nor a reason supporting the unwarranted restrictions on the powers of the FCC and other federal agencies generated by the court of appeals' holding that agencies lack power to pre-empt state common law causes of action. That holding unquestionably does violence to heretofore settled principles of administrative law and judicial review concerning the use of declaratory orders by federal agencies and thus the decision below warrants review by this Court.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petitions, the petition for a writ of certiorari should be granted.

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on "the fact that the Federal Communications Commission—the body entrusted with administering the provisions of the Act—has long interpreted § 315" as pre-empting state libel law).